



June 19, 2001

Mr. Stephen Evans  
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OR2001-2608

Dear Mr. Evans:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148556.

The City of Whitehouse (the "city"), which you represent, received a request for any and all employee records maintained by the city pertaining to the City Marshall. You claim that the requested information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first note that section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>1</sup> This section encompasses information protected by other statutes. The submitted documents contain information that is confidential under the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). For your convenience, we have marked the submitted medical records subject to the MPA.

The submitted information also contains a declaration of medical condition and a declaration of psychological and emotional health, which are both made confidential by section 1701.306 of the Occupations Code.<sup>2</sup> Section 1701.306 provides, in relevant part, as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306. We have marked the information that must be withheld pursuant to section 1701.306 of the Occupations Code.

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<sup>2</sup>The Seventy-sixth legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

We note that one of the documents you submitted to this office is an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. We have marked the Form I-9 to be withheld in conjunction with section 552.101.

We also note that among the records at issue is information pertaining to participation in the Texas Municipal Retirement System. This information is made confidential under section 855.115(a) of the Government Code which provides in part that "information contained in records that are in the custody of the retirement system concerning an individual member, retiree, annuitant, or beneficiary is confidential under Section 552.101" unless certain exceptions apply which are not applicable here. Thus, the city must withhold the information we have marked under section 552.101 in conjunction with section 855.115(a).

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, the fact that an employee participates in a group insurance plan funded by a governmental employer and the amount of any payroll deduction therefor is not information that is excepted from disclosure. Open Records Decision No. 600 at 9 (1992). On the other hand, information relating to an

employee's choice of insurance carrier and his election of optional coverages is confidential under the right of privacy, *id.* at 10-11. Similarly, this office has determined that information revealing the personal financial decision to voluntarily have certain deductions made from an employee's paycheck meets the *Industrial Foundation* test. Open Records Decision No. 545 (1990). This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990).

This office has also held that information relating to one's credit history meets the common law privacy test. Open Records Decision No. 481 (1987). Additionally, an employee's designation of beneficiary is protected by common law privacy. Open Records Decision No. 600 at 10 (1992). Employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code. *Id.* at 8. However, neither a public employee's date of birth nor the employee's character references are protected by common law privacy. Open Records Decision No. 455 at 9 (1987). A public employee's job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986). In addition, the public has a legitimate interest in the job qualifications, including college transcripts, of public employees. ORD 470. We have marked the information within the submitted documents that is protected by common law privacy and must therefore be withheld under section 552.102 of the Government Code.

We also note that some of the information in the submitted personnel file is protected by section 552.117(2) of the Government Code. The city must withhold those portions of the records that reveal a peace officer's home address, home telephone number, and social security number, and whether the officer has family members, regardless of whether the peace officer complies with section 552.024.<sup>3</sup> The city must also withhold the officer's *former* home address and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). We have marked the documents accordingly.

Section 552.119 excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer, unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted information includes a photograph of a peace officer, and it does not appear that any of the exceptions are applicable. You have

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<sup>3</sup>"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

not informed us that the peace officer has executed any written consents to disclosure. Thus, the city must withhold the photograph depicting the peace officer. We have marked the photograph to be withheld.

Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

The city must withhold under section 552.130 the Texas driver's license numbers appearing in the submitted information. We have marked this information.

To summarize, medical records may only be released in accordance with the MPA. The declarations of medical condition and of psychological and emotional health are confidential under section 1701.306 of the Occupations Code in conjunction with section 552.101. A portion of the information is excepted from disclosure under section 552.102 in conjunction with common-law privacy. Employee W-4 forms are excepted from disclosure by section 6103(a) of title 26 of the United States Code. Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. The city must withhold the information we have marked under section 552.101 in conjunction with section 855.115(a) pertaining to the Texas Municipal Retirement System. Information pertaining to the peace officer's home address, home telephone number, and social security number, and information as to whether the officer has family members, must be withheld under section 552.117(2). The photograph of the peace officer must be withheld under section 552.119. The Texas driver's license numbers must be withheld under section 552.130. The remainder of the requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/seg

Ref: ID# 148556

Enc. Submitted documents

c: Mr. Paul L. Black  
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(w/o enclosures)